

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2004

4 (Argued: January 3, 2005 Decided: August 17, 2005)

5 Docket Nos. 04-4543-cr(L), 04-5801-cr(CON)

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7 UNITED STATES OF AMERICA,

8 Appellee,

9 - v. -

10 TOMO RAZMILOVIC, DAVID E. NACHMAN,

11 Defendants,

12 KENNETH JAEGGI,

13 Movant-Appellant.

14 -----
15 B e f o r e: FEINBERG, WINTER, and SOTOMAYOR, Circuit Judges.

16 Appeal from a denial of a motion to vacate an ex parte
17 pretrial order freezing assets subject to criminal forfeiture in
18 the Eastern District of New York (Leonard D. Wexler, Judge). We
19 hold that 28 U.S.C. § 2461(c), enacted as part of the Civil Asset
20 Forfeiture Reform Act of 2000, does not authorize pretrial
21 restraint of forfeitable assets. We therefore vacate the
22 restraining order.

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14
15 WINTER, Circuit Judge:

16
17 Kenneth Jaeggi appeals from Judge Wexler's denial of his
18 motion to vacate an ex parte pretrial order freezing assets
19 claimed by the government to be forfeitable proceeds of alleged
20 securities, mail, and wire fraud offenses. We hold that 28
21 U.S.C. § 2461(c), enacted as part of the Civil Asset Forfeiture
22 Reform Act of 2000 ("CAFRA"), does not authorize pretrial
23 restraint of assets subject to criminal forfeiture. We therefore
24 vacate the restraining order.

25 BACKGROUND

26 Jaeggi was the Senior Vice President of Finance and the
27 Chief Financial Officer of Symbol Technologies, Inc. ("Symbol"),
28 a publicly traded company, from May 1997 to December 2002. An
29 87-page indictment, filed on May 28, 2004, charged Jaeggi and
30 other Symbol officers and executives with, inter alia, securities
31 fraud, 15 U.S.C. §§ 78j(b), 78ff; wire fraud, 18 U.S.C. § 1343;
32 mail fraud, id. § 1341; and conspiracy, id. § 371. The

1 indictment also stated that the government would seek forfeiture
2 of certain of Jaeggi's assets upon his conviction -- the
3 "proceeds" of the securities, mail, and wire fraud offenses --
4 pursuant to 18 U.S.C. § 981(a)(1)(C) (authorizing civil
5 forfeiture for mail, wire, and securities fraud proceeds) and 28
6 U.S.C. § 2461(c) (authorizing criminal forfeiture where civil
7 forfeiture authorized).

8 The indictment charged Jaeggi and his codefendants with two
9 illegal schemes. First, it alleged that between 1999 and
10 December 2002 they manipulated Symbol's financial results to meet
11 or exceed securities analysts' performance forecasts. Second, it
12 alleged that the defendants participated in a "look-back scheme"
13 in which, when exercising their stock options, they backdated the
14 exercise date to claim a lower stock price thereby reducing the
15 taxable gains realized by the defendants. The two schemes are
16 alleged to have involved conspiracy and substantive offenses of
17 securities fraud, tax evasion, and mail and wire fraud.

18 After filing the indictment, the government successfully
19 moved for an ex parte order restraining specified assets
20 belonging to Jaeggi. The court later amended that order, again
21 ex parte, to freeze additional assets, amounting to a total value
22 of approximately \$7.5 million. The government claimed these
23 assets were proceeds of Jaeggi's illegal activity and would be
24 forfeitable upon his conviction.

1 Jaeggi moved to vacate or modify the restraining order,
2 claiming, inter alia, that it was not authorized by Section
3 2461(c). The district court denied the motion.

4 DISCUSSION

5 Whether Section 2461(c) authorizes pretrial restraint of
6 putative forfeitable property is a legal issue that we review de
7 novo. United States v. Gotti, 155 F.3d 144, 146 (2d Cir. 1998).

8 a) Language

9 In interpreting Section 2461(c), we look first to its
10 language. "Statutory construction begins with the plain text
11 and, if that text is unambiguous, it usually ends there as well."
12 United States v. Gayle, 342 F.3d 89, 92 (2d Cir. 2003). Section
13 2461(c) provides that

14 If a forfeiture of property is authorized in
15 connection with a violation of an Act of
16 Congress, and any person is charged in an
17 indictment or information with such violation
18 but no specific statutory provision is made
19 for criminal forfeiture upon conviction, the
20 Government may include the forfeiture in the
21 indictment or information in accordance with
22 the Federal Rules of Criminal Procedure, and
23 upon conviction, the court shall order the
24 forfeiture of the property in accordance with
25 the procedures set forth in [21 U.S.C. §
26 853], other than subsection (d) of that
27 section.

28
29 Section 2461(c) thus authorizes criminal forfeiture as a
30 punishment for any act for which civil forfeiture is authorized,
31 and allows the government to combine criminal conviction and
32 criminal forfeiture in a consolidated proceeding.

1 Section 2461(c) directs that "upon conviction" an order of
2 "forfeiture" shall be entered "in accordance with the procedures"
3 set out in 21 U.S.C. § 853. Section 853 authorizes criminal
4 forfeiture as a punishment for drug crimes and sets forth the
5 procedures governing such forfeiture, the forfeitable property,
6 and the forfeiture-related actions that are allowed. 21 U.S.C. §
7 853. For example, Section 853 specifies that a court "shall"
8 order forfeiture of certain property at sentencing, 21 U.S.C. §
9 853(a), and that when a forfeiture order is entered, "the court
10 shall authorize the Attorney General to seize" the forfeited
11 property, id. § 853(g). It defines forfeitable property as,
12 inter alia, the property used to facilitate, and proceeds of,
13 violations of the Controlled Substances Act, 21 U.S.C. § 801 et
14 seq. Id. § 853(a).

15 In forfeiture-related actions, Subsection (e) of Section 853
16 authorizes, post-indictment, pretrial "Protective Orders" as
17 follows:

18 [T]he court may enter a restraining order or
19 injunction, require the execution of a
20 satisfactory performance bond, or take any
21 other action to preserve the availability of
22 property described in subsection (a) of this
23 section for forfeiture under this section
24 . . . upon the filing of an indictment or
25 information charging a violation of this
26 subchapter or subchapter II of this chapter
27 for which criminal forfeiture may be ordered
28 under this section and alleging that the
29 property with respect to which the order is
30 sought would, in the event of conviction, be
31 subject to forfeiture under this section

1

2
3 Id. § 853(e) (1)-(1) (A).

4 Whether Section 853(e) is incorporated into Section 2461(c)
5 is the principal subject of this appeal. The opposing arguments
6 go thusly. For the government, it is argued that, because
7 Section 2461(c) incorporates all of Section 853 except subsection
8 (d), Section 853(e)'s pretrial restraint procedures are
9 incorporated. The critical inference drawn is that, in
10 specifically excluding subsection (d), Congress must have
11 intended to include all other subsections of Section 853. **[R-19]**
12 For Jaeggi, it is argued that Section 2461(c) authorizes
13 "forfeiture" "in accordance with the procedures" set out in
14 Section 853 only "upon conviction." There was thus no need for
15 Congress specifically to exclude any provisions of Section 853
16 relating to pretrial procedures because such procedures are
17 inapplicable to post-conviction proceedings and were not even
18 purportedly incorporated into Section 2461(c). In contrast,
19 there was a need to exclude Section 853(d) explicitly because it
20 establishes a rebuttable presumption that certain property is
21 subject to forfeiture. This presumption would apply under
22 Section 2461(c) "upon conviction" but for Congress's specific
23 exclusion.

24 We hold that the language of Section 2461(c) dictates the
25 conclusion that it does not authorize pretrial restraint of

1 forfeitable assets. Section 2461(c)'s use of the term
2 "forfeiture" cannot include pretrial restraint. Forfeiture is
3 the "divestiture of property without compensation," Black's Law
4 Dictionary 661 (7th ed. 1999). In a criminal case, it
5 constitutes punishment for a crime and necessarily occurs post-
6 conviction. See Libretti v. United States, 516 U.S. 29, 38-39
7 (1995); Fed. R. Crim. P. 32.2(b)(3) (order of forfeiture "must be
8 made a part of the sentence and be included in the judgment").
9 The distinction between forfeiture and pretrial restraint is no
10 technical play on words. Pretrial restraint is a severe remedy
11 independent of a right to damages or property following a finding
12 of liability. Indeed, the Supreme Court has dubbed pretrial
13 restraint as a "'nuclear weapon' of the law." Grupo Mexicano de
14 Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 332
15 (1999) (pretrial restraint of debtor's assets in civil
16 proceeding).

17 The language of Section 2461(c), read as a whole, reinforces
18 this interpretation. It permits two things: inclusion of
19 forfeiture allegations in certain criminal indictments "in
20 accordance with" the Federal Rules of Criminal Procedure, and
21 "forfeiture . . . upon conviction . . . in accordance with" the
22 procedures of Section 853, except for subsection (d). The "upon
23 conviction" language not only recognizes the fact that forfeiture
24 is an act that occurs after conviction but also serves to specify

1 which procedures are to be used. At the indictment stage, the
2 Federal Rules of Criminal Procedure apply; "upon conviction," the
3 procedures of Section 853 are used. The only plausible reading
4 of Section 2461(c) therefore is that it incorporates all of the
5 Federal Rules' procedures relevant to forfeiture allegations in
6 indictments, and all of Section 853's procedures relevant to
7 post-conviction forfeiture, except subsection (d).¹ Section
8 853(e)'s procedures relating to pretrial restraint do not relate
9 to post-conviction forfeiture and never were incorporated, so
10 Congress had no need to exclude them.

11 To the extent that any forfeiture-related procedures apply
12 under Section 2461(c) during the period between indictment and
13 conviction, they must be found in the Federal Rules of Criminal
14 Procedure. The Rules, however, do not authorize pretrial
15 restraint of assets subject to forfeiture. They address only the
16 inclusion of forfeiture allegations in indictments, notice of
17 potential forfeiture during plea colloquies, post-conviction
18 preliminary orders of forfeiture, and final orders of forfeiture.
19 Fed. R. Crim. P. 7(c)(2), 11(b)(1)(J), 32.2(b)(2)-(3), (c)(2).

20 b) Other Forfeiture Statutes and Their Interpretation

21 The government's strongest argument is not based on
22 statutory language. Instead, it notes that "the enactment of a
23 criminal forfeiture statute without a restraining order provision
24 would have been regarded as oddly incomplete and uniquely

1 deficient" because "all criminal forfeiture statutes that set
2 forth the procedures to be followed in criminal cases have
3 provided for the issuance and enforcement of pre-trial
4 restraining orders."

5 Although the factual premise of this argument is strictly
6 true, the argument is misleading. There are four statutes that
7 authorize criminal forfeiture and set forth the procedures to be
8 followed. All authorize pretrial restraint of forfeitable
9 assets. See 18 U.S.C. § 1963(d) (pretrial restraint in RICO
10 cases); 21 U.S.C. § 853(e) (pretrial restraint in drug cases); 18
11 U.S.C. § 1467(c) (pretrial restraint in obscenity cases); 18
12 U.S.C. § 2253(c) (pretrial restraint in child pornography cases).
13 However, most criminal forfeiture statutes do not set forth the
14 procedures to be followed; instead, they -- like Section 2461(c)
15 -- incorporate the procedures of Section 853, other than
16 subsection (d). These statutes are cataloged in the margin.² We
17 have never held that any of them authorize pretrial restraint.
18 Indeed, no reported case has mentioned pretrial restraint under
19 any of the statutes listed in Note 2,³ with one exception.

20 That exception is the general criminal forfeiture statute,
21 18 U.S.C. § 982(b), which incorporates the procedures of Section
22 853, except subsection (d). 18 U.S.C. § 982(b)(1). Several
23 courts of appeals have held Section 982(b) to authorize pretrial
24 restraint. See United States v. Kirschenbaum, 156 F.3d 784, 791

1 (7th Cir. 1998) (pretrial restraint of forfeitable assets allowed
2 under Section 982(b)(1)); see also United States v. Bollin, 264
3 F.3d 391, 421-22 (4th Cir. 2001) (same); United States v. Jones,
4 160 F.3d 641, 644 (10th Cir. 1998) (same); United States v.
5 Field, 62 F.3d 246, 248-49 (8th Cir. 1995) (same); United States
6 v. Ripinsky, 20 F.3d 359, 361-62 (9th Cir. 1994) (same). This
7 fact gives us pause, albeit a short one.

8 The weight of these decisions for our purposes is
9 considerably weakened by the fact that none of them has addressed
10 the arguments presented in this case. Furthermore, Section 982 -
11 - along with every other criminal forfeiture statute that
12 incorporates the procedures of Section 853 -- includes language
13 to suggest that it incorporates more than just those procedures
14 of Section 853 relevant to actual forfeiture. Specifically,
15 Section 982 provides that "[t]he forfeiture of property under
16 this section, including any seizure and disposition of the
17 property and any related judicial or administrative proceeding,
18 shall be governed by" Section 853, except subsection (d). 18
19 U.S.C. § 982(b)(1) (emphasis added); see also supra note 2 (other
20 statutes incorporating procedures of Section 853 use similar or
21 identical language). In contrast, Section 2461(c) states only
22 that "upon conviction, the court shall order the forfeiture of
23 the property in accordance with the procedures set forth in"
24 Section 853, except subsection (d).⁴

1 We need not decide whether the “seizure” and “related
2 judicial or administrative proceeding” language in Section 982
3 and other forfeiture statutes authorizes pretrial restraint under
4 the provisions of Section 853. There may be arguments pro or con
5 as to this issue.⁵ It suffices here to note that the absence of
6 such language from Section 2461(c) leaves no room for argument
7 that it arguably authorizes pretrial remedies.

8 c) Intent and Policy

9 Given our conclusion that Section 2461(c)’s plain language
10 fails to authorize pretrial restraint, consideration of its
11 legislative history or policy arguments advanced by the
12 government is not mandatory. See United States v. Peterson, 394
13 F.3d 98, 107-08 (2d Cir. 2005); Gotti, 155 F.3d at 149 (“[W]here
14 a statute is plain on its face, the court does not resort to
15 legislative history or to the purpose of the statute to discern
16 its meaning.”). We nevertheless note that “[n]othing in the
17 legislative history of [Section 2461(c)] requires a different
18 result” than that dictated by its language. Gotti, 155 F.3d at
19 149. No congressional committee report on CAFRA or statement by
20 a representative or senator asserts that, or even addresses the
21 issue of whether, CAFRA authorized pretrial restraint of
22 forfeitable assets under Section 2461(c).

23 The only explicit references to an intent to authorize
24 pretrial restraint cited by the government are two isolated

1 statements by representatives of the Department of Justice at
2 Congressional hearings. The statements, given before House and
3 Senate committees, were essentially identical, asserted that the
4 law "should" permit criminal forfeiture as well as pretrial
5 restraint in a variety of cases, and urged passage of proposed
6 legislation similar to what became Section 2461(c). See Civil
7 Asset Forfeiture Reform Act: Hearing on H.R. 1835 Before the
8 House Comm. on the Judiciary, 105th Cong. 121 (1997) (statement
9 of Stefan D. Cassella, Assistant Chief, Asset Forfeiture and
10 Money Laundering Section, Crim. Div., Dep't of Justice);
11 Oversight of Federal Asset Forfeiture: Its Role in Fighting
12 Crime: Hearing on Federal Asset Forfeiture, Focusing Its Role in
13 Fighting Crime and the Need for Reform of the Asset Forfeiture
14 Laws Before the Subcomm. on Crim. Justice Oversight of the S.
15 Comm. on the Judiciary, 106th Cong. 23-24 (1999) (statement of
16 Eric H. Holder, Jr., Deputy Attorney Gen., Dep't of Justice).

17 These statements are evidence of what the Department wanted
18 but not of what Congress intended. They made no attempt to alert
19 Congress to the significance of incorporating Section 853, much
20 less to explain how prefacing that incorporation with the words
21 "upon conviction" authorized pretrial restraint. Nor is there
22 any evidence that anyone in Congress thought they were doing more
23 than what the language of Section 2461(c) said. This hardly
24 demonstrates Congressional intent to add to the government's

1 arsenal a "'nuclear weapon,'" Grupo Mexicano, 527 U.S. at 332.

2 Finally, the government makes a policy argument posed in the
3 guise of ineluctable logic, namely that it "would have made no
4 sense" for Congress to enact a statute authorizing the use of
5 criminal forfeiture but to omit a pretrial restraint provision,
6 without which actual forfeiture might never be possible. **[R-21]**

7 In light of the statutory language, this is a complaint that
8 should be addressed to Congress. See United States v. Monsanto,
9 491 U.S. 600, 614 (1989).⁶ Moreover, the law does not always
10 accompany an entitlement to assets with pretrial restraint
11 provisions. To the contrary, pretrial restraint is the
12 exception, not the rule. See Grupo Mexicano, 527 U.S. at 333 (no
13 general equitable power in federal courts to issue preliminary
14 injunction restraining assets in civil proceeding); De Beers
15 Consol. Mines v. United States, 325 U.S. 212, 223 (1945)
16 (preliminary injunctions restraining assets have "not been
17 thought justified in the long history of equity jurisprudence");
18 Ripinsky, 20 F.3d at 365 (substitute assets not subject to
19 pretrial restraints); In re Assets of Martin, 1 F.3d 1351, 1355-
20 56 (3d Cir. 1993) (same); United States v. Floyd, 992 F.2d 498,
21 502 (5th Cir. 1993) (same).⁷

22 CONCLUSION

23 Because 21 U.S.C. § 2461(c), enacted as part of CAFRA, does
24 not authorize pretrial restraint of forfeitable assets, we vacate

1 the restraining order. In view of our disposition of this
2 matter, we need not address Appellant's other arguments. We
3 issue this decision even though a motion for modification of the
4 restraining order is pending before us. We shall dispose of that
5 motion in the very near future.

FOOTNOTES

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1. The government argues that Section 853(d) does not relate to post-conviction procedures because it applies “at trial.” Specifically, subsection (d) states that “[t]here is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter . . . is subject to forfeiture” It is true that the rebuttable presumption might be relevant before conviction in the context of pretrial restraint of assets, but it also would be crucial post-conviction at sentencing in determining which assets would be forfeited.

2. See 18 U.S.C. § 38(d) (forfeiture for fraud involving aircraft or space vehicle parts in interstate or foreign commerce, “including any seizure and disposition of the property, and any proceedings relating to the property, shall be” governed by Section 853, except subsection (d)); 18 U.S.C. § 793(h) (3) (forfeiture for espionage crimes governed by Section 853, except subsections (a) and (d), which “shall apply to -- (A) property subject to forfeiture under this subsection; (B) any seizure or disposition of such property; and (C) any administrative or judicial proceeding in relation to such property, if not inconsistent with this subsection”); 18 U.S.C. §§ 794(d) (3), 798(d) (3) (same language for different types of espionage

offenses); 18 U.S.C. § 982(b) (forfeiture for certain crimes, and "[t]he forfeiture of property under this section, including any seizure and disposition of the property and any related judicial or administrative proceeding, shall be governed by" Section 853, except subsection (d)); 18 U.S.C. § 1028(g) (same language in provision for mandatory forfeiture for fraudulent production of identification documents); 18 U.S.C. § 1029(c)(2) (same language in provision for mandatory forfeiture for access devices fraud); 18 U.S.C. § 1037(c)(2) ("[t]he procedures set forth in [Section 853], other than subsection (d) of that section . . . shall apply to all stages of a criminal forfeiture proceeding" for electronic mail fraud); 18 U.S.C. § 1834(b) (forfeiture mandatory for trade secret offenses, and "[p]roperty subject to forfeiture under this section, any seizure and disposition thereof, and any administrative or judicial proceeding in relation thereto, shall be governed by [21 U.S.C. § 853], except for subsections (d) and (j)"); 42 U.S.C. § 1786(p) (punishment for illegally obtaining, trafficking, or using "food instruments" includes forfeiture, and "all property subject to forfeiture under this subsection, any seizure or disposition of the property, and any proceeding relating to the forfeiture, seizure, or disposition shall be subject to [Section 853], other than subsection (d) of that section"); 50 U.S.C. § 783(e) (illegal transmission or receipt of classified information punishable by forfeiture, and Section 853,

except subsections (a) and (d), applies to "(A) property subject to forfeiture under this subsection; (B) any seizure or disposition of such property; and (C) any administrative or judicial proceeding in relation to such property, if not inconsistent with this subsection").

3. Besides Section 982, only one of the statutes incorporating Section 853 and using the "seizure"/related proceeding language - 18 U.S.C. § 794(d), an espionage statute -- has been used to authorize forfeiture in a reported case. Ames v. Commissioner, 112 T.C. 304, 308 (1999). Apparently, pretrial restraint was neither sought nor granted in Ames.

4. There are several criminal statutes other than Section 2461(c) that mention Section 853 without using the "seizure"/related proceeding language. In some of these, forfeiture and pretrial restraint for the relevant crime are mandatory and expressly authorized in Section 853 itself, which states that it applies to violations of 21 U.S.C. §§ 801-904 and 951-971. See e.g., 21 U.S.C. § 848(a) (stating that "the forfeiture prescribed in section 853" is part of the sentence imposed on those convicted of continuing criminal enterprises); 21 U.S.C. § 970 ("Section 853 of this title, relating to criminal forfeiture, shall apply in every respect to a violation of this subchapter punishable by

imprisonment for more than one year."); 21 U.S.C. § 333(e) (3) (distribution of human growth hormone considered a felony violation of Controlled Substances Act "for the purposes of forfeiture under" Section 853); see also 18 U.S.C. § 3554 (forfeiture mandatory for RICO and drug crimes, using provisions of 18 U.S.C. §§ 1963 or 853). In another statute, Section 853 specifically applies "to all stages of a criminal forfeiture proceeding" under that provision. 18 U.S.C. § 1037 (criminal statute for electronic mail fraud). In 31 U.S.C. § 5332, Section 853 is mentioned, but restraint is expressly authorized as well. 31 U.S.C. § 5332(b) (3). Finally, 31 U.S.C. § 5317, while mentioning Section 853 without the "seizure"/related proceeding language, is a statute pertaining to search warrants for illegally transported monetary instruments and assumes seizure of the instruments as part of that warrant. 31 U.S.C. § 5332(c).

5. We have found no caselaw construing the "seizure"/related proceeding language of the statutes cited in Note 2, nor do the parties cite to any. Although an awkward way of accomplishing the purpose, it is possible that the "related judicial proceeding" language was intended to incorporate the pretrial restraint procedures of Section 853(e). Or, it may be that the "seizure" language was so intended, albeit an equally awkward method. With respect to the latter, the government is entitled

to a pretrial warrant to "seiz[e]" "property subject to forfeiture under this section," 21 U.S.C. § 853(f), if it meets the standards for a search warrant. Specifically,

If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) of this section [the pretrial restraint provision] may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.

Id. Section 853(f) itself appears to incorporate Section 853(e). Section 853(f) applies only where a restraining order under Section 853(e) is insufficient to protect the forfeitable assets. It would seem nonsensical to allow seizure where a restraining order will not be sufficient to protect assets but not to allow a restraining order or seizure where a restraining order would be sufficiently protective. See United States v. Melrose E. Subdivision, 357 F.3d 493, 504 (5th Cir. 2004) ("Both Congress and the Constitution see pretrial restraining orders as preferable, somewhat less restrictive alternatives to outright seizure. It would frustrate that preference were the government able to seize property more easily than it could restrain it.") (internal citations omitted). Finally, if the "seizure"/related proceeding does not have the purposes discussed above, it would appear to be superfluous, a disfavored result. See Dunn v. Commodity Futures Trading Comm'n, 519 U.S. 465, 472 (1997)

(expressing reluctance to treat statutory terms as surplusage).

6. Indeed, this precise argument was rejected in Gotti -- there, for allowing pretrial restraint of substitute assets under Section 853 -- because the plain language of the statute did not authorize such a restraint. 155 F.3d at 149.

7. The government also argues, in a footnote, that the All Writs Act, 28 U.S.C. § 1651(a), empowered the court to order pretrial restraint in this case. The Supreme Court has squarely held that the All Writs Act does not provide independent statutory authority for issuing pretrial restraints; rather it confers only the power to issue writs that would be authorized under traditional equitable jurisdiction. Grupo Mexicano, 527 U.S. at 326 n.8, 333. The government offers no evidence that pretrial restraint of defendants' assets was available in equity.